CALIFORNIA ATTORNEY DENIED RECOVERY OF ATTORNEY FEES IN NEW YORK

Spivak v. Sachs

16 N.Y.2d 163, 263 N.Y.S.2d 953, 211 N.E.2d 329 (1965)

Plaintiff, a California attorney, while still in California was urged by the defendant to assist her in the settlement of her matrimonial litigation in New York. Plaintiff advised defendant that he was not licensed to practice law in that state but defendant still insisted that he come. Plaintiff went to New York and worked for defendant for fourteen days examining various drafts of separation agreements proposed by defendant's New York counsel and discussing her problems as to financial arrangements and custody of the children. According to his testimony, plaintiff rendered legal advice to defendant based on his knowledge of California and New York law.[1] When defendant refused to pay, plaintiff sued to recover the reasonable value of his services. The supreme court awarded recovery and the appellate division affirmed.[2] The Court of Appeals, however, reversed,[3] holding that plaintiff had engaged in the unauthorized practice of law in violation of section 270 of the Penal Law.[4]

The appellate division held that Spivak had not engaged in the practice of law in New York,[5] reasoning that "the practice of law" constituted either a "holding out to be an attorney" capable of practicing law in New York or a continuous course of conduct carried on in the state.[6] They also held that

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[1] Spivak v. Sachs, 21 App. Div. 2d 348, 250 N.Y.S.2d 666 (1964), *rev'd*, 16 N.Y.2d 163, 263 N.Y.S.2d 953, 211 N.E.2d 329 (1965).

[2] Spivak v. Sachs, 21 App. Div. 2d 348, 250 N.Y.S.2d 666 (1964) (three-to-two decision).

[3] Spivak v. Sachs, *supra* note 1 (four-to-three decision).

[4] N.Y. Penal Law § 270 (1965 Supp.):

> It shall be unlawful for any natural person to practice . . . as an attorney-at-law . . . or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner . . . or advertise the title of lawyer . . . in such manner as to convey the impression that he . . . conducts or maintains a law office . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath. . . .

The relevant words of § 270 are "to practice" law. It was held early that "to practice law *in any manner* is prohibited to those not lawyers" by this section. People v. Alfani, 227 N.Y. 334, 337, 125 N.E. 671, 672 (1919). (Emphasis added.)

[5] Spivak v. Sachs, *supra* note 2, at 350, 250 N.Y.S.2d at 668.

[6] *Ibid.*

The "holding out" doctrine was established in People v. Alfani, *supra* note 4, where Alfani was not an attorney but told his clients that he could give legal advice and was engaged in the drawing of pleadings. This constituted a holding out. The continuous course of conduct was established in various cases. Blumenberg v. Neubecker, 12 N.Y.2d 456, 240 N.Y.S.2d 730, 191 N.E.2d 269 (1963); Matter of New York County Lawyers Ass'n (Bercu), 273 App. Div. 524, 78 N.Y.S.2d 209 (1948).

a single act by an unlicensed person does not constitute a violation of section 270.[7] Justice Eager dissenting stated: "The plaintiff was engaged in the practice of law here in the violation of the statute. This was not the case of a 'single or isolated act' nor the case of furnishing advice which was merely incidental to plaintiff's practice of law in California."[8]

The decision of the appellate division was subjected to various criticism.[9] However, the case was the first time in which the New York courts were forced to decide the right of recovery of an out-of-state attorney who assisted a New York client in New York matters; no other state has been faced with this exact issue, either. After the decision of the appellate division in *Spivak* a federal court decided a case which involved a California attorney who came to New York at the request of New York counsel and assisted in the litigation of an antitrust suit in federal court.[10] The California attorney brought the action to recover the reasonable value of his services. The court, in granting recovery,[11] appeared to rely on *Spivak* and interpreted the "single act" rule:

> It would seem that the "solitary incident" means a specific matter for one client, as opposed to "a continuous course of conduct" . . . [which] refers to representing a number of different clients in different matters and thus approximating the normal activities of an admitted lawyer practicing in New York.[12]

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[7] Spivak v. Sachs, *supra* note 2, at 350, 250 N.Y.S.2d at 668, the court stating: "But where, as here, a solitary incident is presented, and no otherwise improper act or holding out is involved, the statute is not violated." The single, isolated act test was established by People v. Goldsmith, 249 N.Y. 586, 164 N.E. 593 *reversing* 224 App. Div. 707, 229 N.Y.S. 896 (1928), and later applied in People v. Weil, 237 App. Div. 118, 260 N.Y.S. 658 (1932). The "practice of law" is vague and is meant to be so. Perhaps the best way it can be described is those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries. See Arizona State Bar v. Arizona Land Title & Trust, 90 Ariz. 76, 366 P.2d 1 (1961).

[8] Spivak v. Sachs, *supra* note 2, at 352, 250 N.Y.S.2d at 670.

[9] 50 Cornell L.Q. 360 (1965). At page 364 the author stated: "In view of the language of section 270, the prior New York cases, and the law in other jurisdictions, it would have been relatively easy for the court to have held against Spivak." See generally *id.* at 360-70 for an excellent summary of the New York case law in point. See also 33 Fordham L. Rev. 483 (1965). The author concluded at 492:

> However, without probing and conclusive analysis of the facts presented, the summary dismissal of a relatively lengthly series of conferences, such as occured in the instant case, as a "solitary incident" does not lead to a more precise guide to the conduct permitted of out-of-state attorneys. It merely indicates a possible trend toward greater leniency.

Also see generally *id.* at 483-92 for a resourceful compilation of New York case law. See also 29 Albany L. Rev. 154. This author went as far as saying at 157, "the giving of legal advice under these circumstances constituted a 'continuous course of conduct' and was therefore within the statute."

[10] Spanos v. Skouras Theatres Corp., 235 F. Supp. 1 (S.D.N.Y. 1964), *aff'd*, 364 F.2d 161 (2d Cir. 1966).

[11] The court granted plaintiff recovery of $89,606.29 for legal services rendered over a period of years.

[12] Spanos v. Skouras Theatres Corp., *supra* note 10, at 13.

Hence the federal court concluded that the attorney did not violate section 270. But the court went on to say: "even if the conduct of Spanos were violative of the terms of Section 270, I do not believe New York could penalize Spanos by denying him recovery for the services rendered [because he practiced in federal court and this is not regulated by the New York Penal Code]."[13] The court was quite reluctant to rely on the decision of the appellate division in *Spivak*. After the decision in *Spanos*, the Court of Appeals, in the instant case, reversed the appellate division's decision.

Spivak's recovery in the two lower New York courts was based on the theory that what he did was not the practice of law but was merely a "single, isolated incident." However, the Court of Appeals held that this did not meet the solitary incident test stating: "Here we have a California lawyer brought to New York not for a conference or to look over a document but to advise directly with a New York resident as to most important marital rights and problems."[14] The court made it clear that the criterion of the solitary incident test is not a specific matter for one client. Hence the court in *Spanos* was justified in not relying solely on the appellate division's interpretation of the solitary incident test. However the Court of Appeals did little to lay down a guideline for future cases.

Future cases will force on the court more difficult questions than the present case. The Court of Appeals recognized this and stated:

> There is, of course, a danger that section 270 could under other circumstances be stretched to outlaw customary and innocuous practices. . . . [W]e cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York. We can decide those cases when we get them but they are entirely unlike the present one.[15]

Thus the court said there will be exceptions to the rule but this case was not an exception. However, the court failed to establish the criteria necessary to identify the exceptions. The area must be examined to see where the courts will make them.

An exception has been established where an out-of-state attorney wants to enter a foreign state for a court appearance, and an admission procedure exists whereby the attorney may notify the court that he needs to appear in

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[13] *Ibid.*

[14] Spivak v. Sachs, *supra* note 1, at 167, 263 N.Y.S.2d at 956, 211 N.E.2d at 331.

[15] *Id.* at 168, 263 N.Y.S.2d at 956, 211 N.E.2d at 331. The court stated its adherence to the doctrine followed in Appell v. Reiner, 43 N.J. 313, 204 A.2d 146 (1964). In *Appell* a New York attorney did practice in New Jersey but in such a close connection with a New York legal matter that it was not unauthorized practice. The court in *Appell* stated at 316, 204 A.2d at 148:

> [L]egal services to be furnished to New Jersey residents relating to New Jersey matters may be furnished only by New Jersey counsel . . . . [There are] unusual situations in which a strict adherence to such a thesis is not in the public interest . . . . It follows that there may be instances justifying such exceptional treatment warranting the ignoring of state lines.

this single case and, if the court approves him, he will be permitted to appear in court.[16] Following the admission procedure is not as essential as the existence of the right to do so.[17] However, usually the foreign counsel must associate with local counsel.[18]

Out-of-state attorneys who go into a foreign state but not to appear in court are presented with difficulties. Although, they can be drawn into the state for conferences or business transactions for home-state clients, or many similar innocent situations, they have no available procedure to determine whether they will be engaging in the unauthorized practice of law or only that legal work normally incident to a regular practice in one state. The need has been recognized,[19] but little has been done to clarify the lines for attorneys.[20]

Courts have expressed some of the policy reasons why the unauthorized practice of law should not be tolerated. One of the major reasons advanced is the protection of the public against incompetent or unqualified advice.[21]

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[16] N.Y. Ct. App. R. VII (4) states:

> An attorney and counsellor-at-law or the equivalent from another state, territory, District, or foreign country may, in the discretion of any court of record, be admitted pro hac vice to participate in the trial or argument of any particular cause in which he may for the time being be employed.

The rule was upheld in Finnerty v. Siegal, 168 Misc. 476, 5 N.Y.S.2d 309 (Sup. Ct. 1938).

[17] Spanos v. Skouras Theatres Corp., *supra* note 10, at 14. The court stated:

> [I]n fact Spanos was not admitted to the bar of this Court pro hac vice. As indicated earlier, I do not feel that this ought to be decisive to deny him recovery of that which he would otherwise be entitled . . . . The conclusion is that Spanos may recover for the reasonable value of his services.

[18] Arthaud v. Griffin, 202 Iowa 462, 210 N.W. 540 (1926); Bradley v. Sudler, 172 Kan. 367, 239 P.2d 921 (1952), *subsequent appeal*, 174 Kan. 293, 255 P.2d 650 (1953). See generally Annot., 45 A.L.R.2d 1065. *Cf.*, Meyer v. Brinsky, 129 Ohio St. 371, 195 N.E. 702 (1935), where the associate-with-local-counsel rule applied intercounty within the state was not upheld on the basis that when an attorney was admitted to state practice the privilege was not restricted to one county.

[19] The need was recognized as early as 1924 by the New York legislature when there was an attempt to revise §270 and allow out-of-state attorneys to engage in a limited form of practice outside of the courts. Association of the Bar of New York City, Year Book, "Annual Report of the Special Committee of the Practice of Law in this City by Lawyers of other Jurisdictions," 1924.

[20] Illinois and Missouri have attempted to meet the situation by adopting reciprocity rules which appears to have led to an unrestricted interstate practice when the business necessity requires an attorney to cross state lines. Ill. Rev. Stat. ch. 13, § 12 (1963), Mo. Sup. Ct. R. 9.01.

[21] Otterbourg, A Study of Unauthorized Practice of Law 4-5 (1951), states:

> Actually, unauthorized practice of law is a swindle upon the public. Whenever it takes place, some persons receive either incompetent or unqualified advice, or advice which cannot be honestly disinterested. Such advice in many instances can deprive the person so advised of protection to which the law entitles him. Reliance upon such advice may result in irreparable injury and loss.

The court in *Spivak*, *supra* note 1, at 168, 263 N.Y.S.2d at 956, 211 N.E.2d at 331, also recognized this policy reason and stated: "The statute aims to protect our citizens

For this consideration, out-of-state attorneys are usually placed in the same category as laymen.[22] However, there clearly is a distinction between a layman giving legal advice and an out-of-state attorney giving advice in a similar situation. In the latter case, the risk is not as great as in the typical unauthorized practice situation where the legal services are provided by a layman.[23] Generally, the policy reason of protection of the public is a valid reason and should be considered.

Further, the courts apparently feel there is more need to protect a client from an out-of-state attorney when he is acting in a transaction out of court, because the judicial tribunals are not present to prevent any miscarriage which might occur from his lack of knowledge of local law.[24] This reason has validity when considered in connection with the protection of the public.

A still further reason advanced is that these restrictions may serve to restrict supply and, hence, lead to a more productive practice for those attorneys within the state.[25] Ethically the reason lacks merit, but realistically it must be analyzed as one of the underlying factors that will be considered by the courts.

Another argument advanced is that the out-of-state attorney will not be subjected to the local Canons of Ethics. But he will still be subject to his own state's code of ethics: "Since 1914 many additional states have adopted the American Bar Association's Canons, substantially intact. Some have adopted them prospectively, as from time to time amended by the American Bar Association."[26] The differences in the canons among the states appears to be negligible compared with the necessity of interstate legal activities.

The reasons underlying the restrictions on interstate legal activities are valid and, probably, the soundest policy reason is the protection of the public against incompetent legal advice. However, when the general rule is extended into our modern-day business world, its repercussions are more significant and, therefore, the reasons must be more closely questioned. The court in *People v. Alfani* stated: "All rules must have their limitations, according to

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against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions."

[22] "The Lawyer Who Practices Outside His Own State," Unlawful Practice News, June, 1957, at 67.

[23] Johnstone, "The Unauthorized Practice Controversey, A Struggle Among Power Groups," 4 Kan. L. Rev. 1, 5 (1955).

[24] People v. Alfani, *supra* note 4. See also, MacNeil v. Hearst Corp., 160 F. Supp. 157, 160 (D. Del. 1958); Petition of Kearney, 63 So. 2d 630 (Fla. 1953); Fallon v. State, 8 Ga. App. 476, 69 S.E. 592 (1910).

[25] Johnstone, *supra* note 23, at 5, where Johnstone states:

> Many of the efforts by lawyers to deal with lay competition are not based exclusively on the objective of driving laymen from the field of law practice. They are also aimed at restricting the number of lawyers so as to provide higher incomes for those who are authorized to practice . . . .

[26] Drinker, Legal Ethics 25 (1953).

the circumstances, and as the evils disappear or lessen."[27] These limitations have been noted by the courts and now the exceptions must be delineated.

Fact situations which should mark exceptions to the usual rule are as yet undefined. However, three factors should influence the courts: the state in which the attorney is licensed to practice; the state of formation of the attorney-client relationship; and the location of the legal transaction. As long as all three of these are located in one state there is no problem. But once one of these factors is removed to another state, a presumption of unauthorized practice arises. To rebut this presumption policy considerations must negate the reasons preventing the interstate practice of law. Policy considerations are: the nature of the legal transaction involved; the efficiency that will be promoted; and the financial burden on the client. The consideration of where the attorney-client relationship was formed provides insight into the good faith of the attorney. The nature of the legal transaction constitutes the most significant consideration as variations in this element determine the importance of maintaining efficiency and keeping the financial burden on the client reasonable.

A series of hypothetical cases will reveal this interrelation. For the first and clearest, assume that the attorney and the legal transaction are located in California but that the attorney-client relationship was formed in New York, while the attorney was in New York on a social visit. The only reason to support a presumption of unauthorized practice is that the attorney is establishing his pool of clients by relations outside his state, thus reducing the available supply of clients for New York attorneys. But in this case it is highly questionable whether he is really reducing the cases New York attorneys could handle because there would be a much stronger presumption of unauthorized practice against a New York attorney handling the case. Only the good faith of the California attorney could be questioned for procuring a New York client, but because the California attorney is in a better position than anyone else to represent the client no problems should be encountered.[28]

Second, assume that the attorney is located in California, the attorney-client relationship was formed in California, and the client lives in California but became involved in a legal transaction in New York. Should the California attorney engage in out-of-court activities concerning the New York transaction? The presumption of unauthorized practice arises, and, to the extent that New York law is involved, there is the danger that this California attorney is not as learned in New York law as a New York attorney; he is decreasing the available supply of work for New York attorneys and he is not subject to the New York Canons of Ethics. But there may be factors to rebut this presumption. The formation of the attorney-client relationship in California presents two factors. One, the California attorney did not go out of state to gain clients, thus establishing good faith and, two, the California attorney may

[27] *Supra* note 4, at 341, 125 N.E. at 674.

[28] Freeling v. Tucker, 49 Idaho 475, 289 Pac. 85 (1930) (presence of good faith on the part of the attorney as the attorney-client relationship was formed in attorney's state).

be more familiar with the problems of this partciular client. In the interests of efficiency, this attorney may be more capable of handling the client's problem. The nature of the legal transaction involved is important also. If all that is required is being present for the reading of a will, it is more sensible to allow the California attorney to represent the client than if the attorney were required to bring a stockholder's derivative action against a New York corporation. The importance given to the burden that will be placed on the client should be inversely proportional to the size of the legal transaction. In the interests of efficiency and lessening the burden on the client when the transaction is not complex and intimately involved with local law, it should be more reasonable to have the California attorney handle the suit. The ultimate answer as to whether this would be unauthorized practice must depend on the combination of these factors.[29]

Third, assume that the attorney is from California, the legal transaction is in New York, the attorney-client relationship was formed in New York and the client resides in New York. If the California attorney were to do the work a strong presumption of unauthorized practice would arise. The good faith of the attorney must be questioned if this case were the sole basis of the attorney-client relationship; that is, why is a California attorney forming attorney-client relationships in New York? Also, the nature of the legal transaction must be closely scrutinized. If, perhaps, the New York legal transaction were a transaction arising out of a prior California transaction, the California transaction were quite complex, the New York transaction were rather minor and the California attorney could easily handle the New York action because of his familiarity with the issues in California, then the California attorney's action might be justified. Further, if a significant financial difference to the client will result, then, it would be easier to justify the California attorney's action. However, these circumstances are rare and the facts of this hypothetical case render the presumption for unauthorized practice nearly irrebuttable.[30]

The policy considerations discussed in the foregoing cases were applied in a recent New Jersey case, *Appell v. Reiner*,[31] involving the extension of credit by both New York and New Jersey creditors to New Jersey residents. The plaintiff was a New York attorney and he was only licensed to practice law in New York. It was decided that it would have been too inefficient to have two separate attorneys. Recovery was granted to the attorney

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[29] "Interstate and International Practice of Law," 31 So. Cal. L. Rev. 416, 420 (1958), presented four main factors which would favor an exception to the rule:

> (1) the attorney-client relationship was established in F-1 in good faith and not to avoid the F-2 practice of law restrictions; (2) the transaction is substantially completed; (3) the transaction will only require an occassional contact by the F-1 attorney in F-2; and (4) the nature of the transaction is sufficiently complex so that it would be impractical or detrimental to change attorneys.

[30] *Ibid.*

[31] Appell v. Reiner, *supra* note 15.

although it was established that he did practice law in New Jersey.[32] Two standards were established here: (1) financial burden on the client, (2) efficiency.[33] The court stated: "Under the peculiar circumstances here present, independent negotiations by members of different bars, even though cooperating to the greatest extent, would be grossly impractical and inefficient."[34] The court went on to say that one of the responsibilities of the states is to make legal advice financially possible.[35] In order to do this there must not be an unreasonable burden placed on the client.

The court in the instant case correctly reversed the decision of the appellate division and denied recovery to Spivak.[36] With the application of the criteria established herein the result would have been the same but, perhaps, the reasons would have been more certain. The attorney-client relationship was formed outside of California and was formed only with respect to this case.[37] The case was not incidental to any California litigation for the same client. The attorney was not licensed to advise as to New York law and the use of a California attorney was highly inefficient and resulted in a much greater financial burden being placed on the client.

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[32] *Id.* at 316, 204 A.2d at 147. The court stated: "There is no doubt that plaintiff's activities in New York and New Jersey constituted the practice of law."

[33] *Id.* at 316-17, 204 A.2d at 148.

[34] *Id.* at 317, 204 A.2d at 148.

[35] *Ibid.* The court stated:

> Additionally, had defendants been obliged to retain second counsel in New Jersey the ultimate aggregate fees would in all probability have exceeded the reasonable compensation to which plaintiff would legitimately be entitled in acting as their sole representative. This additional financial burden is, if possible, to be avoided.

[36] Spivak v. Sachs, *supra* note 1.

[37] *Ibid.*